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October 6, 2006

The Honorable Philip N. Hogen
Chairman, National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, D.C. 20005

RE: Follow-up Questions to September 19, 2006 Hearing Testimony

Dear Chairman Hogen:

This is in response to your letter of September 27, 2006, requesting answers to two follow-up questions concerning my September 19, 2006 testimony. I hope the answers assist you and the Commission in developing the best possible regulations on this subject.

You asked:

1. If we were to include the State in the appeal process, how would we protect the confidential and proprietary information in the record?

Answer:

First, the States have no interest in using any confidential trade secret or proprietary information to profit. Most of the states are willing to sign reasonable confidential trade secret agreements if necessary, to acknowledge their use of the information is for investigatory purposes only, and that the States with open records laws agree and understand that the information provided is protected by various federal property laws. Preliminarily, it should be noted that in order to be a meaningful participant in an appeal process, the State needs timely notification accompanied by the relevant and requisite information from the application process, sufficient for independent analysis and response.

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Second, confidential and proprietary information provided by the applicant to the Commission, need not and should not preclude a full and fair disclosure to the State of the information necessary to assess whether a device is indeed a "technologic aid." The State must be able to determine that the technologic aid merely assists the player and is not the game itself. In this respect, the State needs the same unclassified or non-confidential information that the Commission needs in order to make the determination whether the device is a technologic aid or an electronic facsimile or computerized slot machine.

In order to readily distinguish an "aid" from an electronic or electromechanical facsimile or computerized slot machine, the State should be able to learn information, such as the following:

- a. in general terms, how the aid "assists" the player;
- b. which technologic aids relate to the selection of the key element of chance for the game (e.g., random number generators); which technologic aids relate to a player station with which the player interacts; in short, a breakdown of the different "aid" or multiple "aid" used in the play of a game;
- c. the rules of the game, including, but not limited to, how many players may play; what bingo or bingo-related features qualify the game as bingo; where and how entry into the game is paid for; the stakes in the game; the "play of a game," namely, the sequence of actions at the player station initiated by a player constituting his or her wagering activity; what options are available to the player; what the player physically must do to or with the technologic aid in order to play the game; what constitutes a "win" of the game; how must the player notify or be notified of a win; the "paytable," that is the set of prizes available to players for achieving certain outcomes or patterns in the game on offer; and similar matters understood to be the "rules" of the game;
- d. a complete listing or identification of all electrical and mechanical physical components making up the equipment on which class II games are played ("gaming equipment");
- e. what precise information is displayed on a player station, relating to the play of the game, at the start, during the play and at the conclusion of the play of the game, what duration and percentage of the screen is occupied by a recognizable bingo card image, and whether these displays include all information required to be displayed by the technical standards established by the Commission;
- f. how the technologic aid complies with the technical standards established by the Commission, without disclosing specifically copyrighted or protected software, data

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communications protocols, encryption or algorithms needed for the functioning of the respective technologic aid;

f. how the aid is used in the play of, display of information for and implementation of rules for "progressive prizes;"

g. as for credit, win and loss meters at a player station, when, where and what is displayed to the player;

h. what constitutes "game initiation," and what specific interaction must the player have with a player station to commence a game, enter a game, and play the game;

i. how are bingo "cards" assigned to a player, and what guarantees that the "aid" which is the player station with a bingo card is truly independent of the "aid" that is the random number generator;

j. how the "aids" are interconnected (without disclosing confidential software or data communications information), so that the random number generator does not simply provide winning numbers, but must provide drawn numbers to be matched up against completely independently obtained "card" numbers held by multiple players, obtained previous to the draw and provided by a different "aid;"

k. in general, how the "aids" work to allow the play of the game so that among multiple players, one player wins at a time as against another player or players;

l. any other information that discloses and explains how the technologic aid or aids are readily distinguishable from an electronic facsimile of bingo or a game similar to bingo, or from a computerized slot machine played by multiple players, or a string of computerized slot machines played by multiple players.

Third, the States do not have an overt interest in confidential or protected software, hardware or protocols relating to data encryption, communications or other algorithms used to allow the device or devices to function as described. The description, however, of the device and how it functions must not be confidential, lest the customer and others are left without the ability to determine whether the game is fair and not "rigged." The States fully understand that, if the device is truly a technologic aid used for class II gaming, it is the Commission that has the regulatory and law enforcement jurisdiction that may require access to, inspection and regulation of certain proprietary information. If, however, the device, as described, functions more as an electronic facsimile or computerized slot machine played by multiple players, it requires a determination that it is in fact a class III device requiring a compact between the state and the tribe.

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Additionally, you asked:

2. What economic impact on the State, if any, do you expect if the proposed regulations are issued, or are not issued?

Answer:

The nature of gaming throughout the States is so varied, and the incidence of illegal class III machines masquerading as class II machines is also so varied that there is no simple answer to this question. All the CWAG States and other interested States have been alerted to the proposed regulations and comment period and they have been encouraged individually to comment based on their own specific situations.

The principal concern for the state Attorneys General here is legal, not economic. The intent of Congress was to distinguish permissible technologic aids used in class II gaming from electronic and electromechanical facsimiles or slot machines of any kind, which it explicitly classified as class III gaming.

If adopted as written, the regulations will tighten the definition of electronic facsimile so as to disallow devices currently in use that appear to be nothing more than a slot machine, or series of slot machines connected to one another, played by multiple players instantaneously. Disallowing such devices clearly may decrease gaming in those tribal casinos utilizing such machines, and correspondingly decrease the income and economic value of the tribal casino. That occurrence does not necessarily mean a negative economic impact to the local community. Economic studies are not uniform in suggesting positive economic impact to the local community from tribal gaming; indeed, in certain locations, the local impact of gaming activity, including traffic, degraded infrastructure and environment, increased fire and police protection, and similar impacts, are costly to the states and local governments.

On the other hand, if Tribes are required to compact with States for the use of devices that are electronic or electromechanical facsimiles or slot machines of any kind, instead of using uncompacted "class II devices," the States and Tribes are more inclined to work out mitigation agreements that could improve infrastructure. Such improvements will obviously improve economic opportunity for the tribe and, potentially, the local community as well.

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If I may provide any additional information to assist the Commission, please do not hesitate to contact me.

Sincerely,



TOM GEDE
Executive Director
Conference of Western Attorneys General

cc: CWAG Attorneys General
Incoming CWAG Executive Director Karen White
Incoming CWAG Legal Director Charles McGuigan